

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

MONIQUE SMITH,

Petitioner,

v.

CIVIL ACTION NO. 5:20-CV-256
Judge Bailey

B. ANTONELLI, Warden,

P. ADAMS, Warden,

Respondents.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before this Court for consideration of the Report and Recommendation of United States Magistrate Judge James P. Mazzone [Doc. 11]. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Mazzone for submission of a proposed report and recommendation ("R&R"). Magistrate Judge Mazzone filed his R&R on February 4, 2021, wherein he recommends that petitioner's Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 [Doc. 1] be denied and dismissed without prejudice for lack of jurisdiction. For the reasons that follow, this Court will adopt the R&R.

I. BACKGROUND

Petitioner is a federal inmate incarcerated at FCI Hazelton in Bruceton Mills, West Virginia. Petitioner, acting *pro se*, initiated this habeas corpus proceeding on December 15, 2020, pursuant to 28 U.S.C. § 2241. On February 14, 2013, petitioner was sentenced to life plus sixty-months after being convicted of several drug and firearm offenses, including being a convicted felon in possession of a firearm in violation of 18 U.S.C.

§ 922(g)(1) and possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c).¹

In his memorandum of law in support of his petition, petitioner argues that he is actually innocent of being a felon in possession and possession of a firearm in furtherance of a drug trafficking offense based on the Supreme Court's holding in ***Rehail v. United States***, 139 S.Ct. 2191 (2019). He contends that "the government failed to present evidence that Petitioner knew he belonged to the relevant category of persons barred from possessing a firearm," and, as such, the jury did not find each element of the crime charged. [Doc. 1-1 at 2].

On February 4, 2021, Magistrate Judge Mazzone filed his R&R. Therein, the magistrate judge found that the petition should be denied because petitioner is challenging the legality of his conviction but cannot meet the savings clause of § 2255(e). Specifically, petitioner cannot meet the three-pronged test set forth in ***In re Jones*** 226 F.3d 328, 332 (4th Cir. 2000), to show that § 2255 is "inadequate or ineffective." The R&R finds that even if petitioner could satisfy the first and third prongs, he cannot meet the second prong, which requires a showing that the substantive law has changed such that the conduct for which the prisoner was convicted is deemed not to be criminal.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or

¹Taken from Smith's criminal docket from the Central District of Tennessee, available on PACER. See ***United States v. Smith***, 3:22-CR-194-14.

recommendation to which no objections are addressed. **Thomas v. Arn**, 474 U.S. 140, 150 (1985). Nor is this Court required to conduct a *de novo* review when the party makes only “general and conclusory objections that do not direct the court to a specific error in the magistrate’s proposed findings and recommendations.” **Orpiano v. Johnson**, 687 F.2d 44, 47 (4th Cir. 1982).

In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court’s Order. 28 U.S.C. § 636(b)(1); **Snyder v. Ridenour**, 889 F.2d 1363, 1366 (4th Cir. 1989); **United States v. Schronce**, 727 F.2d 91, 94 (4th Cir. 1984). *Pro se* filings must be liberally construed and held to a less stringent standard than those drafted by licensed attorneys, however, courts are not required to create objections where none exist. **Haines v. Kerner**, 404 U.S. 519, 520 (1972); **Gordon v. Leeke**, 574 F.2d 1147, 1151 (4th Cir. 1971).

Here, objections to Magistrate Judge Mazzone’s R&R were due within fourteen (14) days of receipt, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. Petitioner filed a letter, styled as objections, which asks this Court to hold this matter in abeyance. [Doc. 13]. Petitioner also timely filed objections to the R&R [Doc. 14] on February 22, 2021. Accordingly, this Court will review the portions of the R&R to which objection was filed under a *de novo* standard of review. The remainder of the R&R will be reviewed for clear error.

III. DISCUSSION

First, the Court turns to the Motion filed February 16, 2021. [Doc. 13]. While styled as “Re: Objections to Magistrate Judge _____ 02/04/2021 R&R,” the letter raises no

objection to the R&R, and instead asks this Court to hold this matter in abeyance pending the outcome of two cases in front of the Supreme Court: **United States v. Gary**, 954 F.3d 194 (4th Cir. 2020), cert. granted, No. 20-444, 2021 WL 77245 (U.S. Jan. 8, 2021), and **United States v. Greer**, 798 F. App'x 483 (11th Cir. 2020), cert. granted, No. 19-8709, 2021 WL 77241 (U.S. Jan. 8, 2021). This Court has reviewed the Motion and finds no reason to hold this case in abeyance; accordingly, the Motion will be denied.

Generally, 28 U.S.C. § 2255 provides the exclusive means for a prisoner in federal custody to test the legality of his detention. However, § 2255(e) contains a savings clause, which allows a district court to consider a habeas petition brought by a federal prisoner under § 2241 where § 2255 is “inadequate or ineffective to test the legality” of the detention. 28 U.S.C. § 2255; *see also United States v. Poole*, 531 F.3d 263, 270 (4th Cir. 2008). The fact that relief under § 2255 is procedurally barred does not render the remedy inadequate or ineffective to test the legality of a prisoner’s detention. *In re Jones*, 226 F.3d 328, 332 (4th Cir. 2000). In the Fourth Circuit, a § 2255 petition is only inadequate or ineffective to test the legality of detention when:

(1) [A]t the time of conviction, settled law in this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provision of § 2255 because the new rule is not one of constitutional law.

Poole, 531 F.3d at 269 (quoting *In re Jones*, 226 F.3d at 333–34).

In Petitioner’s Response to Report and Recommendation [Doc. 14], petitioner raises an objection to the R&R. Petitioner asserts that this Court should depart from the Sixth Circuit’s holding that **Rehaif** is not a new rule of constitutional law. Presumably, petitioner

is arguing that this Court should find that he has met the third prong of **Jones**. This Court finds that such an objection does not affect the magistrate judge's analysis. The R&R found that "Even if the petitioner satisfied the first and third elements of **Jones**, the crime for which he was convicted remains a criminal offense, and therefore, he cannot satisfy the second element of **Jones**." [Doc. 11 at 8]. Even construing petitioner's argument to be challenging the R&R's finding on the second prong of **Jones**, this Court finds this objection to be meritless: the conduct that forms the basis of petitioner's conviction remains a criminal offense. Accordingly, his objection is overruled.

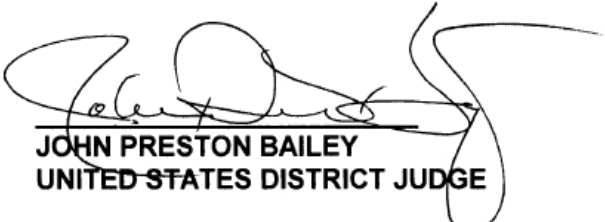
IV. CONCLUSION

Upon careful review of the above, it is the opinion of this Court that the **Report and Recommendation** [Doc. 11] should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. Petitioner's objections [Doc. 14] are **OVERRULED** and petitioner's Motion [Doc. 13] is **DENIED**. The Court **ORDERS** that the § 2241 petition [Doc. 1] be **DENIED** and **DISMISSED WITH PREJUDICE**. This Court further **DIRECTS** the Clerk to enter judgment in favor of the respondent and to **STRIKE** this matter from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: March 2, 2021.


JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE